TEOH KIM HENG A

v.

TAN ONG BAN

COURT OF APPEAL, PUTRAJAYA B
ABDUL MALIK ISHAK JCA
ABDUL WAHAB PATAIL JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: P-02-2400-09-2011]
9 MAY 2014 C

LAND LAW: *Sale and purchase of property - Agreement - Indefeasibility of title - Whether earlier sale and purchase agreements validly terminated - Whether subsequent sale and purchase agreements null and void - Whether subsequent purchaser acquired indefeasible of title to property - Whether subsequent purchaser bona fide purchaser for value without notice - National Land Code, s. 340* D

LAND LAW: *Indefeasibility of title and interest - Sale and purchase of property - Agreements - Whether earlier sale and purchase agreements validly terminated - Whether subsequent sale and purchase agreements null and void - Whether subsequent purchaser acquired indefeasible of title to property - Whether subsequent purchaser bona fide purchaser for value without notice - National Land Code, s. 340* E

The appellant entered into a sale and purchase agreement ('third SPA') with one Mohd Ismail for the sale and purchase of an apartment unit in Villa Mas Ewani Apartments ('property'). Mohd Ismail had earlier purchased the property from the developer *vide* a sale and purchase agreement dated 1 November 2002 ('the second SPA'). The respondent also claimed that he had purchased the property from the developer *vide* a sale and purchase agreement ('first SPA') and had paid RM5,250 as deposit. Since the project was abandoned, no further payments were made by the respondent. In 2006, the respondent discovered that the appellant was carrying out renovation works on the property. The respondent claimed that he was the beneficial owner of the property and demanded that the appellant vacate the property. The respondent contended that he received a letter from Januari Properties Sdn Bhd, representing the developer, informing him that the first SPA had been terminated and enclosed a cheque for RM5,250 which was the refund of the deposit paid. The respondent objected to the termination, F G H I

A contending that the first SPA between him and the developer was valid and enforceable and that the developer had no right to sell the property to any other party. However, the respondent did not take any further step to challenge the termination by the developer until the year 2010. The respondent's claim was that the first B SPAs was still valid and subsisting and its termination by the developer was invalid. Consequently, the second and third SPAs were null and void. On the contrary, the appellant claimed that he had paid the full purchase price to Mohd Ismail and Mohd Ismail had, with the consent of the developer, assigned all rights over the C property to the appellant *vide* a deed of assignment dated 20 May 2005. As such, the appellant claimed that he was a *bona fide* purchaser for value and was neither a party nor privy to the first and second SPAs. The High Court decided in favour of the respondent. Hence, the appeal. The issue that arose for D consideration *inter alia* was whether the appellant was a *bona fide* purchaser for value without notice.

Held (allowing appeal with costs)
Per Aziah Ali JCA delivering the judgment of the court:

E **(1)** Since the appellant was a subsequent purchaser, the appellant would obtain an indefeasible title if he could prove that he was a purchaser in good faith for valuable consideration. The appellant was not privy to the first SPA or the second SPA as the appellant had inspected the property to be unoccupied F and in good condition. (paras 18 & 20)

(2) There was no evidence that Mohd Ismail had instituted any action against the appellant for payment of the balance of the purchase price. That the appellant was in possession of the G property was also not challenged. As such, there was sufficient evidence to show that the sale and purchase transaction between the appellant and Mohd Ismail had been completed. (para 21)

H **(3)** There was no evidence to show that the appellant had acted in concert with Mohd Ismail to effect the disposition of the property. It was apparent that the appellant had no knowledge about the first and second SPAs. As such, the appellant had shown that he was a *bona fide* purchaser for value without I notice and therefore clothed with the statutory protection accorded by s. 340 of the National Land Code. Consequently, the appellant had acquired an indefeasible title to the property. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah memeterai suatu perjanjian jual beli ('PJB ketiga') dengan Mohd Ismail bagi jual beli sebuah pangsapuri di Villa Mas Ewani Pangsapuri ('hartanah'). Mohd Ismail sebelum ini telah membeli hartanah tersebut daripada pemaju melalui suatu perjanjian jual beli bertarikh 1 November 2002 ('PJB kedua'). Responden juga mendakwa bahawa dia telah membeli hartanah tersebut daripada pemaju melalui suatu perjanjian jual beli ('PJB pertama') dan telah membayar RM5,250 sebagai deposit. Oleh kerana projek tersebut diberhentikan, tiada bayaran selanjutnya telah dibuat oleh responden. Pada tahun 2006, responden telah mendapati bahawa perayu telah menjalankan kerja-kerja pengubahsuaian ke atas hartanah tersebut. Responden mendakwa bahawa dia adalah pemilik benefisial hartanah tersebut dan menuntut perayu mengosongkan hartanah tersebut. Responden berhujah bahawa dia telah menerima surat daripada Januari Properties Sdn Bhd, yang mewakili pemaju, memberitahunya bahawa PJB pertama telah ditamatkan dan menyertakan cek bernilai RM5,250 yang merupakan bayaran balik deposit yang telah dibayar. Responden membantah penamatan itu, menegaskan bahawa PJB yang pertama antaranya dan pemaju itu adalah sah serta boleh dikuatkuasakan dan bahawa pemaju tidak mempunyai hak untuk menjual hartanah kepada mana-mana pihak lain. Walau bagaimanapun, responden tidak mengambil apa-apa langkah selanjutnya untuk mencabar penamatan oleh pemaju sehingga tahun 2010. Tuntutan responden adalah bahawa PJB pertama masih sah dan berkuat kuasa dan penamatan PJB pertama oleh pemaju adalah tidak sah. Oleh itu, PJB kedua dan ketiga adalah batal dan tidak sah. Sebaliknya, perayu mendakwa bahawa dia telah membayar harga pembelian penuh kepada Mohd Ismail dan Mohd Ismail telah, dengan persetujuan pemaju, menyerahkan semua hak ke atas hartanah tersebut kepada perayu melalui surat ikatan penyerahan hak bertarikh 20 Mei 2005. Oleh itu, perayu mendakwa bahawa dia adalah seorang pembeli *bona fide* dengan nilai dan bukan pihak kepada PJB pertama dan kedua. Mahkamah Tinggi membuat keputusan yang memihak kepada responden. Oleh itu, rayuan ini. Isu yang timbul untuk pertimbangan, antara lain, adalah sama ada perayu merupakan seorang pembeli *bona fide* dengan nilai tanpa notis.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Aziah Ali HMR menyampaikan penghakiman mahkamah:

(1) Oleh kerana perayu adalah seorang pembeli terkemudian, perayu akan mendapat hak milik tidak boleh disangkal jika dia dapat membuktikan bahawa dia adalah seorang pembeli dengan niat yang baik dan balasan bernilai. Perayu bukan privi kepada PJB pertama atau kedua kerana perayu telah memeriksa hartanah tersebut dan mendapati bahawa hartanah tersebut berada dalam keadaan baik dan tidak berpenghuni.

(2) Tiada sebarang bukti bahawa Mohd Ismail telah memulakan apa-apa tindakan terhadap perayu untuk membayar baki harga belian. Bahawa perayu mempunyai milikan hartanah juga adalah tidak dicabar. Oleh itu, terdapat bukti yang mencukupi untuk menunjukkan bahawa jualan dan transaksi pembelian antara perayu dan Mohd Ismail telah selesai.

(3) Tidak ada keterangan yang menunjukkan bahawa perayu telah bertindak bersama-sama dengan Mohd Ismail untuk melaksanakan pelupusan hartanah tersebut. Adalah jelas bahawa perayu tidak mempunyai pengetahuan mengenai PJB pertama dan kedua. Oleh itu, perayu telah menunjukkan bahawa dia adalah seorang pembeli *bona fide* dengan nilai tanpa notis dan oleh itu terlindung di bawah perlindungan statutori yang diperuntukkan oleh s. 340 Kanun Tanah Negara. Oleh itu perayu telah memperolehi hak milik tidak boleh disangkal terhadap hartanah tersebut.

Case(s) referred to:
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577 CA ***(refd)***

Legislation referred to:
National Land Code, s. 340

For the appellant - Simon Murali; M/s Lio & Partners
For the respondent - Saw Lip Khai; M/s Chooi, Saw & Lim

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-442-2005 [MT2]]

Reported by Sandra Gabriel

JUDGMENT

Aziah Ali JCA:

Salient Facts

[1] The appellant Teoh Kim Heng, (the first defendant in the court below), had entered into a sale and purchase agreement dated 31 May 2004 ("the third SPA") with one Mohd Ismail bin Md Ibrahim ("Mohd Ismail") for the sale of premises known as Unit 15-6, Level 15, Building No. Block A at Villa Mas Ewani Apartments, Bandar Jelutong, Penang ("the property").

[2] Mohd Ismail had earlier purchased the property from the developer Juara Aspirasi (M) Sdn Bhd (the second defendant in the court below), *vide* a sale and purchase agreement dated 1 November 2002 ("the second SPA").

[3] The respondent Tan Ong Ban, (the plaintiff in the court below), claims that he had purchased the property from the developer *vide* a sale and purchase agreement dated 3 July 1996 ("the first SPA") and had paid RM5,250 as deposit. However the project was abandoned at certain stages and delayed. No further payments were made.

[4] In 2006 when the respondent visited the property he discovered that the appellant was carrying out renovation works on the property. He then issued a notice through his solicitor to the appellant demanding the appellant vacate the property. The respondent claims that he is the beneficial owner of the property and that the appellant has trespassed onto the property.

[5] In the amended statement of claim, the respondent states that he had received a letter dated 12 May 2004 from 'Januari Properties Sdn Bhd', purportedly representing the developer, informing him that the first SPA had been terminated and enclosing a cheque for RM5,250. By a letter through his solicitor dated 19 May 2004, the respondent objected to the termination *inter alia* on the ground that the developer had no valid reason to terminate the first SPA. He returned the cheque to the developer. However by another letter dated 3 June 2004 the developer asserted the termination and again enclosed the said cheque.

[6] The respondent contends that the first SPA between him and the developer was valid and enforceable and that the developer had no right to sell the property to any other party.

A However the respondent did not take any further step to challenge the termination by the developer until the year 2010 when the High Court allowed his application to add the developer as the second defendant.

B **[7]** The appellant in his defence claims that he has paid the full purchase price to Mohd Ismail and Mohd Ismail had, with the consent of the developer, assigned all rights over the property to him *vide* a deed of assignment dated 20 May 2005. Upon obtaining possession, he commenced renovation works. The C appellant claims that he is a *bona fide* purchaser for value. He was neither a party nor privy to the first and second SPA.

Respondent/Plaintiff's Claim

[8] In his suit, the respondent sought for *inter alia* the following D reliefs:

(a) a declaration that the termination of the sale and purchase agreement by the developer on 3 June 2004 is invalid;

E (b) a declaration that the sale and purchase agreement dated 3 July 1996 between the respondent and the developer is still valid and legally enforceable;

(c) a declaration that any sale and purchase agreement entered into between the developer and another party after 3 July F 1996 is invalid;

(d) a declaration that any sale and purchase agreement entered into by the appellant in respect of the property is invalid;

(e) a declaration that the respondent is the rightful owner of the G property based on the sale and purchase agreement dated 3 July 1996;

(f) an order that the appellant transfer the strata title to the property to the respondent;

H (g) an injunction to prohibit the appellant from entering the property;

(h) an order that the appellant deliver vacant possession of the property to the respondent immediately.

I **[9]** It must be mentioned that the developer was in liquidation and was represented at the High Court by an officer from the Insolvency Department who took the stand not to defend the suit. No statement of defence was filed on behalf of the

developer. No witnesses were called for the developer, but a former director and shareholder of the developer was called as a witness for the appellant.

Decision Of The High Court

[10] The learned judge decided in favour of the respondent. Essentially His Lordship decided as follows:

(a) the respondent had not fully paid the purchase price and the strata title to the property has yet to be issued, therefore the respondent has no beneficial interest over the property;

(b) the first SPA between the developer and the respondent is still valid and subsisting and the respondent has clearly acquired a legal right over the property;

(c) the second SPA between the developer and Mohd Ismail is null and void because it was executed without the consent and signature of Goldencolt, the proprietor of the land;

(d) Mohd Ismail could not pass over the property which he did not possess to the appellant;

(e) the third SPA between Mohd Ismail and the appellant is invalid;

(f) the appellant is not protected by the doctrine of *bona fide* purchaser as he had failed to prove that he had fully paid the purchase price because Mohd Ismail was not called to confirm the fact;

(g) the appellant did not acquire any interest on the property from Mohd Ismail.

[11] Dissatisfied with the decision of the learned judge, the appellant filed this appeal against the whole judgment of the learned judge. No appeal was filed by the developer.

[12] We have perused the appeal records and considered the submissions made by both parties. Having considered the evidence before us, we agreed with learned counsel for the appellant that, on the evidence, the appellant is a *bona fide* purchaser for value. We therefore allowed the appellant's appeal. The judgment of the High Court in respect of the appellant is set aside. We award costs of RM20,000 here and below. The deposit was ordered to be refunded. We give our reasons below.

A **The Appeal**

[13] The respondent's claim is premised on the contention that the first SPA is still valid and subsisting and the termination of the first SPA by the developer is invalid. Consequently the second
B SPA and the third SPA are null and void.

[14] As we have mentioned earlier, the developer did not defend the suit. No statement of defence was filed. It is a well settled principle that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict is usually
C treated as an admission by him of the fact so asserted. (*Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609). Hence the claim by the respondent that the termination of the first SPA by the developer is invalid and that the said SPA remains valid and subsisting stands unchallenged.

D

[15] Insofar as the claim by the respondent against the appellant is concerned, the facts show that the second SPA between the developer and Mohd Ismail was entered into on 1 November 2002. The certificate of fitness for the property was issued on
E 7 February 2004 (p. 331 appeal record).

[16] The third SPA between Mohd Ismail and the appellant was entered into on 31 May 2004. At the material time strata title has not been issued.

F **[17]** The issue before us is whether there is sufficient evidence to support the appellant's contention that he is a *bona fide* purchaser for value without notice.

[18] On the evidence it is clear that the appellant is a subsequent purchaser. Being a subsequent purchaser, the appellant would
G obtain an indefeasible title if he could prove that he was a purchaser in good faith for valuable consideration. This is a statutory protection accorded by s. 340 of the National Land Code (NLC). The burden of proving that there was a valuable consideration and good faith in the conveyance of the property
H lies on the appellant (see *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577).

[19] Section 340 of the NLC states as follows:

> (1) The title or interest of any person or body for the time
I being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in sub-section (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested;

Provided that nothing in this sub-section shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchase.

[20] We have perused the testimony of the appellant. According to him he runs a coffee shop and he was acquainted with Mohd Ismail because Mohd Ismail patronised his coffee shop. However he knew about the property being for sale not from Mohd Ismail but from a broker. Prior to this he did not know that Mohd Ismail was the owner of the property and he was not privy to the first SPA or the second SPA. Before executing the third SPA, he had inspected the property with the broker and found it to be in good condition and unoccupied. He also knew that the certificate of fitness had been issued. He then contacted Mohd Ismail and asked for a discount on the purchase price but Mohd Ismail refused. He agreed to buy the property at the price asked for by Mohd Ismail. He took possession of the property in 2005.

[21] The appellant says that he has paid the full purchase price to Mohd Ismail. The respondent disputes this. However there is no evidence that Mohd Ismail has instituted any action against the appellant for payment of the balance of the purchase price. Further the fact that the appellant is in possession of the property is not challenged. We are of the considered view that there is sufficient evidence to show that the sale and purchase transaction between the appellant and Mohd Ismail has been completed.

[22] We find no evidence to show that the appellant had acted in concert with Mohd Ismail to effect the disposition of the property. It is apparent that the appellant had no knowledge about the first SPA and the second SPA.

[23] We find that the appellant has shown that he was a *bona fide* purchaser for value without notice and therefore he is clothed with the statutory protection accorded by s. 340 NLC. Consequently the appellant has acquired an indefeasible title to the property. We agree with the learned counsel for the appellant that the respondent's remedy would be against the developer for breach of contract.

[24] For the aforesaid reasons, we allowed the appeal with costs.